Supreme Court, U. S.
FILED
NOV 28 1977
MICHAEL RODAK, JR., CLERK

No. 76-1621

In the Supreme Court of the United States

OCTOBER TERMS, 1977

SENATOR JOHN L. MCCLELLAN, ET AL., PETITIONERS

v.

ALAN MCSURELY AND MARGARET MCSURELY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

DANIEL M. FRIEDMAN,
Acting Solicitor General,

BARBARA ALLEN BABCOCK,
Assistant Attorney General,

FRANK H. EASTERBROOK,
Assistant to the Solicitor General,

Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Constitutional provision involved	2
Statement	3
Summary of argument	14
Argument	19
I. Petitioners are immune from liability for errors in the conduct of an investigation leading to the issuance of a legislative subpoena	19
A. Preliminary investigation leading to the issuance of a subpoena is part of the legislative process	20
B. The Speech or Debate Clause forbids further inquiry once a court determines that a member of Congress or his aide was acting within the scope of legitimate legislative activity	22
C. Any errors in the process of gathering information for a congressional committee are an insufficient basis for the imposition of liability	33
1. Senator McClellan is immune for his role in authorizing the investigation	34

Argument—Continued
2. Senator McClellan, Adlerman, and O'Donnell cannot be held vicariously responsible for Brick's acts ..... Page 35
3. Brick is not responsible for any violations of the three-judge court's "safekeeping" order or liable for the transportation of documents not relevant to the Subcommittee's investigation 38
II. The court of appeals should not have remanded for further proceedings with respect to the allegation that documents may have been shown to the Internal Revenue Service 43
Conclusion 49

CITATIONS

Cases:
Abney v. *United States*, No. 75-6521, decided June 9, 1977 10
Brawer v. *Horowitz*, 535 F. 2d 830 47
Burdeau v. *McDowell*, 256 U.S. 465 ..... 32, 38
Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 10
Doe v. *McMillan*, 412 U.S. 306 ..... 19, 21, 23, 25, 30, 34, 35, 40, 43, 48
Doe v. *McMillan*, C.A.D.C., No. 75-2016, decided July 29, 1977, rehearing denied, October 13, 1977 ..... 46, 48
Dombrowski v. *Eastland*, 387 U.S. 82 ..... 10, 20, 28, 36, 37, 38
Dombrowski v. *Pfister*, 380 U.S. 479 29

Cases—continued
Eastland v. *United States Servicemen's Fund*, 421 U.S. 491 ..... Page *Passim*
Expeditions Unlimited Aquatic Enterprises, Inc. v. *Smithsonian Institution*, C.A.D.C., No. 74-1899, decided September 16, 1977 ..... 25-26, 48
Gravel v. *United States*, 408 U.S. 606 28
Gregoire v. *Biddle*, 177 F. 2d 579, certiorari denied, 339 U.S. 949 26
Hale v. *Henkel*, 201 U.S. 43 30
Kilbourn v. *Thompson*, 103 U.S. 168 ..... 16, 29, 34, 35
Ormsby v. *Chase*, 290 U.S. 387 8
Paul v. *Davis*, 424 U.S. 693 ..... 13, 46
Powell v. *McCormack*, 395 U.S. 486 ..... 34, 35, 36
Regal Knitwear Co. v. *National Labor Relations Board*, 324 U.S. 9 39
Sachs v. *Stecker*, 60 F. 2d 73 47
Tenney v. *Brandhove*, 341 U.S. 367 ..... 21, 23, 29, 42
United States v. *Brewster*, 408 U.S. 501 ..... 25, 33
United States v. *Janis*, 428 U.S. 433 ..... 32, 38, 47
United States v. *Johnson*, 383 U.S. 169 ..... 22, 23, 42
United States v. *MacDonald*, No. 75-1892, certiorari granted, June 20, 1977 10
Constitution and statutes:
United States Constitution:
Article I, Section 6, clause 1 (Speech or Debate Clause 2
First Amendment 3, 16, 30
Fourth Amendment 15, 16, 24, 28, 29, 30, 31, 32, 33
28 U.S.C. 2105 9
Ky. Rev. Stat. § 432.040 (1962) 3

Miscellaneous:
ALI, *Restatement (Second) of Torts* (1977):
Page
Section 587 ---------- 46
Section 598 ---------- 46
Section 652D ---------- 46
Section 652F ---------- 46
Section 652G ---------- 46
Federal Rule of Appellate Procedure, Rule 43(a) ---------- 9
Federal Rules of Civil Procedure, Rule 65(d) ---------- 39
Harper and James, *The Law of Torts* § 5.22 (1956) ---------- 47
Rules of the Supreme Court of the United States, Rule 48(1) ---------- 9
S. Rep. No. 91-137, 91st Cong., 1st Sess. (1969) ---------- 4
S. Res. 191, 91st Cong., 1st Sess. (1969) -- 7

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1621

SENATOR JOHN L. McCLELLAN, ET AL., PETITIONERS

v.

ALAN McSURELY AND MARGARET McSURELY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals *en banc* (Pet. App. 1a–130a) is reported at 553 F. 2d 1277. The opinion of the panel of the court of appeals (Pet. App. 131a–194a) is reported at 521 F. 2d 1024. A prior opinion of the court of appeals (Pet. App. 195a–211a) is reported at 426 F. 2d 664. The orders of the district court (Pet. App. 215a–217a) are not reported.

JURISDICTION

The judgment of the court of appeals *en banc* (Pet. App. 212a–214a) was entered on December 21,

1976. On March 15, 1977, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 20, 1977. The petition was filed on May 19, 1977, and was granted on October 11, 1977. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Speech or Debate Clause bars a private suit for damages against a Senator and his aides, alleging that some of their investigatory activities, in connection with a subject on which legislation may be had, were improper or unconstitutional.

2. Whether the court of appeals properly ruled on an allegation of dissemination of documents that was not presented to or decided by the district court.

CONSTITUTIONAL PROVISION INVOLVED

Article I, Section 6, clause 1 of the Constitution provides:

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

STATEMENT

1. On August 11, 1967, a state judge in Kentucky issued a warrant authorizing a search of respondents' house for seditious literature (A. 76; Pet. App. 6a). State officials executed the warrant that evening, seized a large volume of books, posters, pamphlets, and other materials found in the house, and arrested respondents for criminal sedition, in violation of Ky. Rev. Stat. § 432.040 (1962) (Pet. App. 6a).

On August 16, 1967, respondents sought a federal injunction against their prospective state prosecution; their complaint also requested the return of the seized materials. A three-judge district court was convened. By a divided vote the court declared the Kentucky sedition statute unconstitutional on its face as a violation of the First Amendment and enjoined the prosecution of respondents, who by then had been indicted. *McSurely* v. *Ratliff*, 282 F. Supp. 848 (E.D. Ky.) The court appointed Commonwealth's Attorney Thomas B. Ratliff custodian of the seized materials and directed him to hold the materials in safekeeping until final disposition of any appeal (Pet. App. 6a–7a, 60a–61a). The "safekeeping" order (A. 78) was entered on September 14, 1967.[1]

2. At all times pertinent to this case, the Permanent Subcommittee on Investigations of the Committee on Government Operations of the United States Senate

[1] Many of the other documents in the injunctive action in Kentucky are reproduced as appendices to the jurisdictional statement in *McSurely* v. *Ratliff*, No. 1113, October Term, 1967.

(the Subcommittee) was authorized by resolution of the Senate "[t]o make a full and complete study and investigation of violent disurbances of the peace [and] * * * civil and criminal disorder" (A. 19; Pet. App. 158a–159a and n. 66), with a view to ascertaining the nature and causes of such disturbances and recommending any appropriate legislation. In October 1967 a subcommittee attorney discussed respondents' activities by telephone with Ratliff, and John Brick, an investigator for the Subcommittee, was dispatched to meet Ratliff (A. 19; Pet. App. 7a).[2]

Ratliff told Brick that the materials seized from respondents contained references to a meeting immediately preceding a riot in Nashville, Tennessee, and to organizations suspected of instigating riots. Brick was permitted to examine some of the seized materials.[3] He obtained copies of 234 of the documents and returned to Washington with these copies (A. 19, 20, 96–97 Pet. App. 7a–8a). He did not take any originals.

[2] Between 1965 and 1968 a number of major civil disturbances took place in large cities, in the course of which 189 persons were killed and another 7,615 injured. S. Rep. No. 91–137, 91st Cong., 1st Sess. 1 (1969). One of these riots occurred in Nashville, Tennessee, during April 1967, and the Subcommittee acquired information that appeared to link respondents to that disturbance (Pet. App. 18a).

[3] Ratliff did not notify respondents of his action or seek formal permission of the three-judge court to act as he did. He later gave uncontradicted testimony, however, that before he allowed Brick to see the materials he spoke with one of the three judges of the court and received permission to grant access to Brick (Pet. App. 29a n. 54, 63a).

Brick was aware of the district court's "safekeeping" order, although there has been no allegation that he believed that his actions violated that order (A. 97, 103). Brick obtained copies of a number of "personal letters" of respondents (Pet. App. 34a–36a and nn. 63–65). He later stated that he did not "need" "some" of the letters (*id.* at 35a n. 65).[4] The most personal letter was sealed and placed in a safe to prevent disclosure (A. 98–100; Pet. App. 42a n. 74).

On October 16, 1967, Senator John L. McClellan, the Chairman of the Subcommittee, signed subpoenas directing respondents, Ratliff, and the United States Marshal to produce documents in their possession pertinent to the meeting in Nashville preceding the riot there and to respondents' membership in or employment by several organizations (A. 23–25; Pet. App. 8a). Respondents requested the three-judge district court to prohibit Ratliff and the Marshal from complying with the subpoenas; respondents also requested return of the materials.[5] On October 30, 1967, the court denied these requests and directed all parties to the case "to cooperate with the Senate Committee in making available such of the materials, or copies thereof, as the Committee considers pertinent to its

[4] Brick made this statement in the course of cross-examination during respondents' trial for contempt of Congress (see pages 7–8, *infra*). He explained that he took copies of the relevant documents because they were given to him, and he "didn't select any of these" (A. 97, 102; Pet. App. 36a n. 65; cf. *Id.* at 26a n. 49).

[5] See pages 6a–9a of the jurisdictional statement in No. 1113, October Term, 1967.

230-918—77——2

inquiry."[6] This Court stayed that order pending the district court's consideration of respondents' objections to the subpoenas. *McSurely* v. *Ratliff*, 389 U.S. 949.

On December 14, 1967, the three-judge district court rejected respondents' objections to the subpoenas and ordered Ratliff to allow persons on the Subcommittee staff to make photocopies of the documents.[7] On January 29, 1968, this Court stayed the order pending consideration of respondents' appeal (390 U.S. 914),[8] which it dismissed on March 18, 1968, for want of jurisdiction (*McSurely* v. *Ratliff*, 390 U.S. 412).

Respondents then appealed the disclosure order to the court of appeals, which reversed. *McSurely* v. *Ratliff*, 398 F. 2d 817 (C.A. 6). The court of appeals ordered the documents returned to respondents because (*id.* at 818) "[t]he business of the District Court in this case has been completed. The right of the Court to retain possession of the seized documents, which include no contraband, has expired." The court of appeals stated that its order was without prejudice to the right of the Subcommittee to enforce its subpoenas against respondents (*ibid.*).

3. Following this decision by the court of appeals, Brick returned to Kentucky officials the copies of the 234 documents that he had taken earlier (A. 50, 97–98;

[6] *Id.* at 4a.

[7] See pages 1a–3a of the jurisdictional statement in No. 1113, October Term, 1967.

[8] The stay pertained only to the delivery of the original documents; it did not bar the delivery of photocopies.

Pet. App. 8a n. 13) Ratliff returned the original documents to respondents on November 8, 1968. The United States Marshal simultaneously served respondents with new subpoenas requiring them to testify before the Subcommittee and to bring certain documents with them (*id.* at 9a). Respondents appeared before the Subcommittee on March 4, 1969, but they refused to produce the requested materials (*ibid*).

The Senate cited respondents for contempt of Congress. See S. Res. 191 (and the accompanying report), 91st Cong., 1st Sess. (1969). They were indicted and convicted of that offense after a jury trial in the United States District Court for the District of Columbia. The court of appeals reversed. *United States* v. *McSurely*, 473 F. 2d 1178 (C.A.D.C.). The majority of the panel concluded that the search warrant issued by the Kentucky judge in 1967 was based on an affidavit that did not state sufficient facts to permit the judge to make an independent evaluation of probable cause and that the search warrant was overly broad (*id.* at 1185–1190). The majority held that the subpoena should have been suppressed at trial as the "fruit of the poisonous tree." *Id.* at 1191–1194.[9] The court explicitly declined to consider re-

[9] Judge Wilkey, concurring in the result, argued that congressional committees should be entitled to base subpoenas on knowledge gained from unconstitutional seizures by state officials. 473 F. 2d at 1194–1202. He concluded, however, that the materials sought by the subpoena were not pertinent to the Subcommittee's inquiry (*id.* at 1203–1204).

spondents' argument that the seizures were improper because they had been carried out in aid of a statute later declared to be unconstitutional. *Id.* at 1190 n. 38.

4. On March 4, 1969, the same day they appeared before the Subcommittee, respondents filed the present suit (A. 4–25), seeking money damages and an injunction against any potential criminal prosecution. The district court stayed the civil proceedings to allow the criminal trial for contempt of Congress to proceed; the court of appeals affirmed, although it remanded for further consideration of some collateral matters (Pet. App. 195a–211a).

In September 1971, while the court of appeals was considering the appeal from their convictions for contempt of Congress, respondents filed an amended complaint (A. 26–38), naming as defendants Ratliff and the four petitioners.[10] They sought $50,000 in

[10] The four petitioners are Senator John L. McClellan and three persons who were employees of the Subcommittee during 1967: Jerome S. Adlerman, then General Counsel of the Subcommittee; Donald F. O'Donnell, then Chief Counsel of the Subcommittee; and John Brick, then an investigator for the Subcommittee (see A. 26, 47). Petitioner O'Donnell has retired.

Two petitioners died while the case was in the court of appeals, Brick on October 15, 1973, and Adlerman on October 1, 1975. See Pet. App. 4a n. 1. We have been advised that both Brick and Adlerman left wills that were not probated, that their estates have no representatives, that all assets in the estates have been transferred to their surviving wives, and that respondents did not seek to substitute the survivors or estates for Brick and Adlerman until August 1977. Under these circumstances the actions against Brick and Adlerman appear to have abated. "[T]he law of the place of the wrong determines whether the claim for damages survives the death of the wrongdoer." *Ormsby* v. *Chase*, 290 U.S. 387, 388. Although we conceded in the court of appeals that the claims

damages from each petitioner (A. 37). The complaint alleged, in essence, that petitioners conspired with Ratliff to: (1) carry out the illegal search and seizure of their documents in 1967; (2) inspect and transport to Washington copies of 234 of those documents; (3) inspect those documents in Washington; (4) use the copies as the basis for issuing the subpoena; and (5) procure the citations for contempt of Congress.

Petitioners filed a motion to dismiss or for summary judgment, contending that the Speech or Debate Clause of the Constitution immunizes them from liability for the events described in the complaint (A. 45–46).[11] The district court held a hearing on this motion and, approximately 19 months later, denied it without explanation (Pet. App. 215a). The court declined to certify the case for an interlocutory appeal pursuant to 28 U.S.C. 1292(b) (Pet. App. 216a–217a).

Petitioners appealed, and a divided panel of the court of appeals reversed, ordering the entry of sum-

against Brick and Adlerman technically survive their deaths, substitution is not permissible so long after respondents had both actual and judicial notice of the deaths. We have opposed in the district court respondents' motion to substitute. (The court of appeals declined to decide whether the action against Brick and Adlerman survived their deaths. Pet. App. 44a.)

Out of an abundance of caution, however, we have named Brick and Adlerman as petitioners on the authority of Fed. R. App. P. 43(a), under which the appeal proceedings with respect to them were permitted to go forward notwithstanding their deaths and respondents' failure to request substitution. Compare 28 U.S.C. 2105 with Rule 48(1) of the Rules of this Court.

[11] Ratliff did not move for summary judgment.

mary judgment for petitioners (Pet. App. 131a–194a).[12]

The court of appeals then heard the case *en banc*. In a brief *per curiam* order, the court unanimously instructed the district court to grant partial summary judgment for petitioners (Pet. App. 2a–3a). The court concluded that the Speech or Debate Clause gives petitioners absolute immunity from liability for the inspection or use by the Subcommittee of the 234 copies of documents and for the issuance of the subpoenas and the procurement of the citation for contempt of Congress (*id.* at 39a–43a, 54a).[13]

An equally divided court affirmed the district court's order to the extent that it would subject petitioners to trial with respect to Brick's inspection of the documents and his transportation of the 234

[12] The panel held (Pet. App. 136a–142a), and the *en banc* court unanimously agreed (Pet. App. 10a–11a n. 18), that the immediate appeal was appropriate under the "collateral order" doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541. The Speech or Debate Clause establishes a right not to be "questioned" in court for legislative activities (see *Dombrowski* v. *Eastland*, 387 U.S. 82, 85), and part of that right would be irretrievably lost if petitioners were required to submit to discovery and undergo a trial. The propriety of an immediate appeal in such a situation now has been established by *Abney* v. *United States*, No. 75–6521, decided June 9, 1977. (We discuss the meaning and implications of *Abney* more thoroughly in our brief in *United States* v. *MacDonald*, No. 75–1892, certiorari granted, June 20, 1977 .We have sent to counsel for respondents a copy of our brief in *MacDonald*.)

[13] The court further concluded that respondents had failed to make sufficiently specific allegations concerning petitioners' involvement in the 1967 search to withstand petitioners' motion for summary judgment (*id.* at 21a, 54a).

copies to Washington (Pet. App. 3a, 213a). Judge Leventhal, writing for himself and Judges Bazelon, Wright, McGowan, and Robinson, concluded that *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, established a two-part test to determine whether judicial inquiry is barred by the Speech or Debate Clause. The first part of the test, Judge Leventhal stated, is whether the activity is related to the legislative process; the second is whether the legislative process has been conducted properly. Judge Leventhal concluded that Brick's activities "may fairly be deemed within [the Subcommittee's] province" and that the investigation concerned matters "on which 'legislation could be had'" (Pet. App. 17a). Judge Leventhal thought, however, that Brick's conduct was unlawful (*id.* at 18a–39a, 46a–52a). Because, in Judge Leventhal's view, "employment of unlawful means to implement an otherwise proper legislative objective is simply not 'essential to legislating'" (*id.* at 20a), he concluded that Brick's conduct was not immune from further scrutiny.

Judge Leventhal stated that Brick's conduct violated the Fourth Amendment (Pet. App. 22a–32a) both because it violated the three-judge district court's "safekeeping" order and because the initial seizure of the documents by state officers was a violation of that amendment.[14] Judge Leventhal also apparently con-

[14] Although Judge Leventhal believed that the "safekeeping" order contained a requirement that Ratliff consult with the court before allowing copies of the documents to be made (Pet. App.

cluded that Brick's actions were improper because some of the 234 documents that he received and retained were found to be not material to the Subcommittee's investigation (*id.* at 34a–39a).

Although Judge Leventhal's discussion concentrated on the propriety of Brick's activities, and although respondents "have made no factual proffer of 'involvement in any activity that could result in [the other petitioners'] liability'" (Pet. App. 22a n. 43), he nevertheless concluded that all four petitioners must undergo further proceedings in the district court that might lead to vicarious liability for Brick's deeds (*id.* at 44a–45a).

While the case was pending in the court of appeals, respondents had learned that on occasion the Subcommittee's staff and staff of the Internal Revenue Service had access to each other's files (Pet. App. 13a-16a); respondents suggested to the court that some or all of the 234 documents might have been disseminated outside the Subcommittee, although they did not state that they had any information that this had occurred

---

29a–30a, 48a, 50a), it contains no such command. Ratliff was ordered only to keep the original copies of the documents intact (A. 78), and the three-judge court itself later ordered Ratliff to make them available to the Subcommittee's staff for copying. See pages 5–6, *supra*, and pages 39–40, *infra*.

Judge Leventhal also apparently believed that the three-judge district court had declared the 1967 search to have been unconstitutional (Pet. App. 28a), but this, too, is incorrect. The three-judge court declared the statute unconstitutional and did not discuss the propriety of the search. *McSurely* v. *Ratliff*, *supra*, 282 F. Supp. at 851–854.

(A. 57–58, 65–67). Judge Leventhal wrote that further proceedings must be held in the district court concerning this claim of dissemination, and the court's judgment states that the district court's "judgment is affirmed, in part, * * * on the claim relating to the alleged dissemination of some of the documents outside of Congress" (*id.* at 213a).

Judge Wilkey, writing for himself and Judges Danaher, Tamm, MacKinnon and Robb, argued that summary judgment should have been granted for petitioners (Pet. App. 54a–116a). Although Judge Wilkey accepted Judge Leventhal's interpretation of *Servicemen's Fund* and concluded that petitioners would not be immune if Brick's conduct had been improper (*id.* at 55a n. 3), he disputed Judge Leventhal's conclusion that Brick had acted improperly. He argued that the three-judge district court allowed Brick's inspection of documents and that, although the 1967 search of respondents' house by state officers was unconstitutional, Brick's inspection of the fruits of that search was not a separate illegal act.

Judge Wilkey agreed that further proceedings should be held with respect to the claim of dissemination, but he suggested that in light of *Paul* v. *Davis*, 424 U.S. 693, respondents would be unable to establish any constitutional injury stemming from dissemination of private materials (Pet. App. 54a, 101a–114a).

Judge Danaher, writing for himself and Judges Tamm, MacKinnon and Robb, argued that principles

230-918—77——3

of official immunity require the dismissal of the complaint in its entirety, without regard to the scope of immunity under the Speech or Debate Clause (Pet. App. 117a–130a).[15]

SUMMARY OF ARGUMENT

I

A. The central question in any case involving the Speech or Debate Clause "is whether the actions of the petitioners fall within the 'sphere of legitimate legislative activity.'" *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491, 501. The court of appeals unanimously concluded that Brick's activities here were part of a legitimate legislative investigation. Accordingly, the question that must be resolved is whether petitioners may be held to answer for any mistakes Brick may have made.

B. "[O]nce it is determined that Members [of Congress] are acting within the 'legitimate legislative sphere' the Speech or Debate Clause is an absolute bar to interference." *Servicemen's Fund, supra,* 421 U.S. at 503. The Clause precludes judicial inquiry even into conduct that would be illegal or unconstitutional if performed by private persons. This immunity is necessary not only to guard legislative independence against encroachments by other branches of the government, but also to ensure that Members and their

[15] Although the judges who joined this opinion also joined Judge Wilkey's opinion, the two opinions appear to call for different dispositions of the "dissemination" claim: Judge Wilkey would remand for further proceedings, and Judge Danaher would order the entry of summary judgment for petitioners.

aides are not diverted from their duties by the need to defend against suits brought by the many persons who might be aggrieved by legislative action.

The court of appeals thought that these principles of immunity are inapplicable where the legislative conduct arguably violates the Fourth Amendment. It believed that the use of unconstitutional means is not essential to legislating. But although it should not be necessary to use unlawful means to achieve legitimate objectives, it does not follow that a claim of unlawful conduct lifts the legislative immunity.

Legislative immunity from suit is of assistance only when a Member of Congress or a legislative aide is alleged to have engaged in conduct that would be actionable if engaged in by a private citizen. An immunity that would protect only when no wrong was alleged to have been committed would be no immunity at all. If a colorable allegation of wrongdoing subjects Members of Congress to discovery and trial, then they must submit to the sort of questioning, and endure the travail and disruption, that the Speech or Debate Clause was intended to prevent. The premise of immunity is that it is better to leave some wrongs unredressed than to subject conscientious legislators to time-consuming judicial proceedings and interference with the legislative process. In order to achieve this objective the immunity must apply in cases where questionable or incorrect judgment is alleged.

The rule should be the same for conduct alleged to violate the Fourth Amendment as it is for conduct

alleged to be improper or unlawful in some other way. In *Servicemen's Fund* the Court held that an allegation that a subpoena violated the First Amendment did not overcome the constitutional immunity of Members of Congress. It would have made no difference if the subjects of the subpoena had alleged that it violated the Fourth Amendment because it was unreasonable or overbroad. Violations of the Fourth Amendment are not essential to legislating, but neither are violations of the First Amendment or any other provision of the Constitution.

Gathering information in preparation for hearings, however, is an indispensable part of the legislative process. The immunity pertains to that process. It is inevitable that some mistakes will take place, and that some of these mistakes may be characterized as violations of the Fourth Amendment. But inquiry into allegations of error in matters that are part of the legislative process is precluded by the Speech or Debate Clause.

C. Even if the Court should disagree with these arguments, it still should not affirm the judgment of the court of appeals. Senator McClellan's only role in the events that have become the focus of this suit was as Chairman of the Subcommittee that authorized the investigation. Senator McClellan engaged in no extra-legislative conduct. Even if he had explicitly instructed investigator Brick to engage in conduct that violated the Fourth Amendment rights of respondents, he still would not be answerable for doing so. *Kilbourn* v. *Thompson,* 103 U.S. 168.

Moreover, no evidence in the record connects Senator McClellan, Adlerman, or O'Donnell to any decision made by Brick in the course of the investigation. Because the Speech or Debate Clause bars vicarious liability, the action must be dismissed with respect to these three petitioners even if it may continue with respect to Brick.

Brick, in turn, may not be held vicariously liable for any errors Ratliff may have committed in not obtaining the permission of the three-judge district court to allow Brick to inspect the documents seized from respondents. Ratliff, not Brick, was the custodian of the documents. The "safekeeping" order imposed no duties on Brick, and the question whether Ratliff should have obtained the permission of the court—a question that evenly divided the ten judges of the court of appeals—therefore has no bearing on Brick's liability.

Finally, liability of Brick may not properly be founded on the fact that he returned to Washington with copies of documents that later were asserted to be irrelevant to the Subcommittee's inquiry. Brick was entitled to allow the Subcommittee to make its own decision concerning relevance. He simply took to Congress all of the copies that were handed to him; the selection was performed by Ratliff and other state officials. Brick may have acted improvidently and incorrectly in not handing some of the copies back to state officials, but the Speech or Debate Clause does not permit inquiry into these matters. "The very na-

ture of the investigative function—like any research—is that it takes the searchers up some 'blind alleys' and into nonproductive enterprises. To be a valid legislative inquiry there need be no predictable end result." *Servicemen's Fund, supra,* 421 U.S. at 509.

II

Respondents alleged that some of the documents may have been disseminated to the Internal Revenue Service. The court of appeals thought that such dissemination would be unprotected by the Speech or Debate Clause, and it purported to "affirm" the order of the district court requiring further proceedings on the claim of dissemination. There was no such order to affirm. The issue was injected into the case in the court of appeals. Rather than affirming the judgment, the court of appeals should have allowed respondents to amend their complaint, provided that an amendment at this late date would be permitted by the statute of limitations.

In any event, the allegation of dissemination does not state a claim that survives scrutiny under the Speech or Debate Clause. Members of Congress should not be required to submit to discovery to enable plaintiffs to find out whether they have been injured at all, yet that is what the court of appeals ordered here. Respondents have alleged no more than that some documents *may* have been disseminated—and that contention is made in the face of evidence that all copies of their documents were returned to

them a year before the Subcommittee began providing information to the Internal Revenue Service.

What is more, any dissemination to the Internal Revenue Service would be privileged. Unlike public dissemination—which this Court held in *Doe* v. *McMillan,* 412 U.S. 306, not to be automatically entitled to the protection of the Clause—distribution within the government serves important governmental purposes. Provision of information to law enforcement agencies should be encouraged, and it undoubtedly is within the authority of legislative officials, as it is within the authority of all executive officers of the United States.

ARGUMENT

I

PETITIONERS ARE IMMUNE FROM LIABILITY FOR ERRORS IN THE CONDUCT OF AN INVESTIGATION LEADING TO THE ISSUANCE OF A LEGISLATIVE SUBPOENA

An equally divided court of appeals has required a Senator and one of his aides to undergo further judicial proceedings for their vicarious involvement in the activities of an investigator who is no longer living.[16] It has done so because, in the view of five judges, there was " 'more than merely colorable substance' " (Pet. App. 22a) to the argument that the investigator acted improperly, and because, in the view of all ten judges, the immunity of the Speech or

[16] See note 10, *supra.*

Debate Clause dissolves when a private party can establish "more than merely colorable substance" to an assertion that activities related to the legislative process have been conducted improperly (*id.* at 18a–20a, 55a n. 3).

The court of appeals' approach would seriously erode the protection afforded by the Speech or Debate Clause and would subject Members of Congress to trial in many cases in which private persons claim to have been injured by legislators' actions. The court of appeals erred because it made the scope of Speech or Debate Clause immunity turn upon a resolution of the merits of the allegation of misconduct.

A. PRELIMINARY INVESTIGATION LEADING TO THE ISSUANCE OF A SUBPOENA IS PART OF THE LEGISLATIVE PROCESS

The central question in any case involving the Speech or Debate Clause "is whether the actions of the petitioners fall within the 'sphere of legitimate legislative activity.'" *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 501. The court of appeals unanimously (and correctly) concluded that investigator Brick's activities in inspecting the documents at issue and transporting copies of some of them to Washington were part of a legitimate legislative inquiry by the Subcommittee into matters about which legislation could be had (Pet. App. 17a–18a, 55a n. 3).

This Court held in *Dombrowski* v. *Eastland*, 387 U.S. 82, that the Speech or Debate Clause immunized from liability the activities of a Senator and a legislative aide in "taking over" documents that had been illegally seized by state officials. This decision necessarily established that "taking over" the documents in preparation for committee deliberations was a legitimate legislative activity. Similarly, the Court held in *Doe* v. *McMillan*, 412 U.S. 306, 312–315, that Members of Congress and their investigative staff were absolutely immune from liability for conducting an investigation that uncovered information that arguably was defamatory and irrelevant to legislative purposes.

These cases demonstrate that "the power of inquiry is * * * an integral part of the legislative process." *Servicemen's Fund, supra*, 421 U.S. at 505. "The power to investigate and to do so through compulsory process plainly falls within" the class of legitimate legislative activities (*id.* at 504). Congress cannot legislate without gathering the information on which to base decisions, and the necessary information may be discovered by subpoena or by voluntary cooperation of persons outside Congress. "Investigations * * * are an established part of representative government." *Tenney* v. *Brandhove*, 341 U.S. 367, 377.

When persons apparently possessed of information appear to be unwilling to cooperate with Congress, it may often be necessary to conduct preliminary investigations leading to the issuance of subpoenas. That is what took place here; Brick's investigation led to the issuance of subpoenas, and respondents' refusal to comply with the subpoenas led to their citation for contempt of Congress.

250-918—77——4

Congress' "power to investigate" (*Servicemen's Fund, supra,* 421 U.S. at 504) necessarily includes authority to discover the information needed to make intelligent decisions about whether and how to use subpoenas. See Pet. App. 151a. Congress sought information that appeared to bear on the causes and consequences of urban riots, a matter in which legislation could be had; moreover, "there was reason for investigative focus on [respondents]" (Pet. App. 18a). Investigator Brick therefore was within the bounds of legitimate legislative activities in seeking access to, and transporting to Washington, copies of materials seized from respondents by state officials.

B. THE SPEECH OR DEBATE CLAUSE FORBIDS FURTHER INQUIRY ONCE A COURT DETERMINES THAT A MEMBER OF CONGRESS OR HIS AIDE WAS ACTING WITHIN THE SCOPE OF LEGITIMATE LEGISLATIVE ACTIVITY

"[O]nce it is determined that Members are acting within the 'legitimate legislative sphere' the Speech or Debate Clause is an absolute bar to interference." *Servicemen's Fund, supra,* 421 U.S. at 503. The Speech or Debate Clause, which this Court has always read "broadly to effectuate its purposes" (*id.* at 501), ensures to Congress freedom from executive or judicial oversight of the performance of legislative functions. See generally *United States* v. *Johnson,* 383 U.S. 169. Further judicial inquiry, after making a determination that the activity in question was within the legitimate legislative sphere, would amount to exactly the intrusion that the Clause forbids.

Because the Clause bars inquiry into the propriety of legislative conduct, "Congressmen and their aides are immune from liability for their actions within the 'legislative sphere,' * * * even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes." *Doe* v. *McMillan, supra,* 412 U.S. at 312–313. Courts may not look behind legislative action to determine its wisdom (*Servicemen's Fund, supra,* 421 U.S. at 509) or its motivation (*United States* v. *Johnson, supra,* 383 U.S. at 183). "The legislative privilege * * * is one manifestation of the 'practical security' for ensuring the independence of the legislature" (*id.* at 179), and that security would be largely dissipated if courts or the executive could call legislators to account for what they thought to be improvident, unwise, or ill-motivated performance of their legislative functions. See also *Tenney* v. *Brandhove, supra,* 341 U.S. at 377.

Not only the imperatives of legislative independence but also considerations of legislative efficiency support the determination in *Servicemen's Fund* that inquiry must be at an end once a court has found that the activities in question were within the legislative sphere. "[A] private civil action, whether for an injunction or damages, creates a distraction and forces Members to divert their time, energy, and attention from their legislative tasks to defend the litigation." *Servicemen's Fund, supra,* 421 U.S. at 503. The demands a suit places on legislative time and energy,

no less than concern about the consequences of a formal judicial order, counsel against permitting extended proceedings to inquire into the wisdom or propriety of legislative acts.

The court of appeals nevertheless held that such further proceedings are necessary in this case. Judge Leventhal stated that they are required for two reasons: first, because "[t]he employment of unlawful means to implement an otherwise proper legislative objective is simply not 'essential to legislating'" (Pet. App. 20a), and second, because the protections of the Speech or Debate Clause do not pertain to violations of the Fourth Amendment (*id.* at 19a n. 36, 22a). Neither of these explanations is sound.

1. The observation that it should not be "essential" to use unlawful means to carry out proper objectives is, of course, correct. But it does not follow that an allegation that such means were employed dissipates the immunity that would otherwise pertain to the activity. To the contrary, immunity from suit is of assistance only when a Member of Congress or a legislative aide is alleged to have engaged in activities that would be actionable if done by a private citizen. The court of appeals' conclusion, that an allegation that illegal or improper methods were employed in achieving a legitimate legislative objective lifts the protection of the Speech or Debate Clause, overlooks the principal purpose, and intended operation, of immunity, and it slights this Court's warning that the Clause applies to conduct that, "if performed in other

than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes." *Doe* v. *McMillan, supra,* 412 U.S. at 312–313. See also *United States* v. *Brewster,* 408 U.S. 501, 517.

An immunity that would protect only when no wrong was alleged to have been committed would be no immunity at all. If a colorable allegation of misconduct pierces the immunity, it might as well not exist.[17] If a colorable allegation of wrongdoing exposes a Member of Congress to discovery and trial, then Members must bear the travail, and the disruption of their legislative efforts, that, as this Court explained in *Servicemen's Fund,* the Constitution was designed to prevent. "The ease with which malice [or wrongdoing] can be charged leaves open the possibility that even the conscientious public servant will be dogged by suitors. The mere prospect of lawsuit may discourage even the most courageous official from the full and ardent discharge of altogether lawful duties, lest he become enmeshed in vexatious, though unfounded, litigation." *Expeditions Unlimited Aquatic Enterprises, Inc.* v. *Smithsonian Institution,* C.A.D.C. *en banc,* No. 74–1899, decided September 16, 1977, slip op. 1 (Robinson, J., concurring).

The premise of any grant of absolute immunity is that "it is better to leave unredressed some [misconduct] by officers acting out of malice or excess

[17] In the absence of a colorable allegation of misconduct, a case would be dismissed on the pleadings whether or not the defendants possessed any form of immunity.

zeal, than to subject the conscientious to the constant dread of retaliation. For every case of malicious governmental action potentially remedied by replacing [absolute immunity] with a qualified immunity, hundreds if not thousands of other actions in the public interest may be deferred or omitted." *Id.* at 10–11 (opinion of the court). If the goal of ensuring Congress the legislative independence contemplated by the Constitution is to be achieved, it cannot make a difference whether the plaintiff makes out a colorable claim that the Member of Congress or his aide erred.[18] The immunity must apply in cases of questionable judgment in order to serve its purpose: it must tolerate the possibility of misuse or abuse in order to protect conscientious legislators from vexatious private suits and from judicial or executive second-guessing.

The events giving rise to this suit took place in 1967. They have spawned several decisions by a three-judge district court in Kentucky, a decision by the Court of Appeals for the Sixth Circuit, convictions

[18] As Judge Learned Hand explained with respect to official immunity in *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (C.A. 2), certiorari denied, 339 U.S. 949, "[t]he decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine."

for contempt of Congress (and the reversal of those convictions), and three decisions in this civil suit by the Court of Appeals for the District of Columbia Circuit. Senator McClellan has been enmeshed in this litigation for eight years, and under the disposition of the court of appeals there is no end in sight.

The proceeding will continue because ten judges divided evenly (ten years after the fact) over the question whether there was even "colorable" substance to the allegation that a solitary investigator for the Subcommittee had made errors of judgment in carrying out the concededly legitimate legislative task of gathering information that would help the Subcommittee decide whether to issue subpoenas. The investigator himself died several years ago, and he is no longer available to testify concerning his activities or motivations.[19] No judge has stated that the allegations of respondents' complaint, if proved, would entitle them to relief; respondents have obtained only the opinion of five judges that they have a "colorable" claim. If that is sufficient to subject a Senator to a decade of litigation, with more to come, then the Speech or Debate Clause has failed in its purpose.

2. The court of appeals concluded that, whatever may be the case for other misconduct, the

[19] Investigator Brick gave testimony in the contempt-of-Congress trial that bears on this litigation (A. 96–105), but, as Judge Leventhal recognized, this testimony "cannot bind the Subcommittee, its members, or other of its agents" (Pet. App. 53a). Brick's testimony itself is ambiguous (compare *id*, at 34a–37a and 53a with *id*. at 101a–114a).

Speech or Debate Clause does not shield Members and their aides from liability for violations of the Fourth Amendment. The court found support for this proposition in *Dombrowski* v. *Eastland, supra,* and this Court also, in *dicta* in cases following *Dombrowski,* has suggested that neither Members nor their aides are immune from liability or questioning for conduct that arguably violates the Fourth Amendment. See *Servicemen's Fund, supra,* 421 U.S. at 507–508, quoting from *Gravel* v. *United States,* 408 U.S. 606, 621.

But *Dombrowski* did not involve a situation in which a legislator or an aide was held liable for violating the Fourth Amendment in the course of carrying out otherwise legitimate legislative functions. The plaintiffs in *Dombrowski* made two allegations: first, that Senator Eastland and Subcommittee Counsel Sourwine had participated in a conspiracy with state officials to seize property in violation of the Fourth Amendment; second, that Senator Eastland and Sourwine had "taken over" the illegally-seized documents for congressional use. The Court held that proceedings concerning the allegations of "takeover" were barred by the Speech or Debate Clause. With respect to the allegations of conspiracy to seize the documents in the first instance, the Court required Sourwine (but not Senator Eastland) to submit to further proceedings.

The raid involved in *Dombrowski* was not an incidental violation of the Fourth Amendment in the course of an otherwise legitimate legislative activity.

Plaintiffs charged, rather, that Sourwine conspired with state officials to plan and carry out a raid to gain evidence for use in a state prosecution.[20] Planning and facilitation of a state prosecution are not functions of Congress. Because the state raids did not have a legislative objective, it made no difference to Sourwine's liability whether the conspiracy violated the Fourth Amendment or was actionable in some other way. It was not the case that immunity was dissipated by the nature of the wrong in which Sourwine was alleged to have taken part; rather, because the wrong was committed outside the "sphere of legitimate legislative activity," there was simply no Speech or Debate Clause immunity available at all.[21] See *Servicemen's Fund, supra,* 421 U.S. at 508.

[20] The state prosecution was subsequently enjoined. See *Dombrowski* v. *Pfister,* 380 U.S. 479, which also discusses the circumstances of the searches and seizures.

[21] Similarly, in *Kilbourn* v. *Thompson,* 103 U.S. 168, this Court held that the Sergeant-at-Arms of the House could be liable for imprisoning a recalcitrant witness. Although this case has been cited for the view that Speech or Debate Clause immunity does not apply to wrongful searches and seizures, the Court's holding was that Congress lacked a summary contempt power, and thus any attempt to imprison witnesses was part of the judicial rather than the legislative process. Because the Sergeant-at-Arms was attempting to exercise judicial powers, it made no difference whether the false imprisonment was a violation of the Fourth Amendment or (as the Court seemed to assume) simply a garden variety common law tort. See also *Tenney* v. *Brandhove, supra,* 341 U.S. at 378 ("[t]o find that a committee's investigation has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive").

We therefore submit that no holding of this Court supports the position of the court of appeals. To the extent *dicta* in this Court's opinions support that decision, the *dicta* should not be considered binding. If, as *Servicemen's Fund* holds, courts cannot inquire to determine whether a legislative subpoena violates the First Amendment rights of those to whom it is addressed, they also should not be empowered to determine whether that same subpoena violates the Fourth Amendment rights of those same persons—as the subpoena could if it were, for example, overbroad or unreasonable. See, *e.g., Hale* v. *Henkel,* 201 U.S. 43.

If a court may not enjoin a congressional subpoena on Fourth Amendment grounds, it should not be authorized to award damages for Fourth Amendment violations during the course of congressional investigations. The Speech or Debate Clause protects legislators from liability even though their acts would be unconstitutional if done outside the legislative process (*Doe v. McMillan, supra,* 412 U.S. at 312–313), and we know of no principle that would logically permit the Speech or Debate Clause immunity to be overcome by a Fourth Amendment claim but not a First Amendment claim. Violations of the Fourth Amendment are not essential to legislating, but then neither are violations of the First Amendment or any other provision of the Constitution. Gathering information in preparation for hearings, however, is an indispensable part of the legislative process. The immunity pertains to that process, and the fact that errors in the con-

duct of legislative business may violate one constitutional provision rather than another should not be determinative.

The danger from allowing suits against Members of Congress based upon the Fourth Amendment is especially acute because that Amendment speaks in terms of "unreasonable" searches and seizures. In many cases, the Fourth Amendment simply authorizes a judicial review of the wisdom of executive action. Yet there are sound reasons, which we already have discussed, that counsel against subjecting legislators to the threat of personal liability for undertaking their legislative activities in a manner that a court subsequently may judge to have been "unreasonable."

It often is possible to cast ordinary arguments about error in Fourth Amendment terms. Usually violation of a valid judicial order is thought to be contempt of court, not a violation of the Fourth Amendment. The court of appeals, however, concluded that any violation of the three-judge court's "safekeeping" order would, if established, also be a violation of the Fourth Amendment.

Similarly, Judge Leventhal's opinion characterized the decision by Brick to return to Washington with apparently irrelevant documents as a violation of the Fourth Amendment, although Judge Wilkey concluded that the selection of documents was neither a search nor a seizure, let alone unreasonable.[22] Be-

[22] It is difficult to understand how the selection of irrelevant documents from among those provided to Brick by state officers can

cause of the elasticity of the Fourth Amendment, Judge Leventhal's approach to the Speech or Debate Clause could allow the exception to swallow the rule. Judge Leventhal would allow extensive judicial inquiry into the wisdom and reasonableness of decisions made or actions taken during the course of a congressional investigation—the very sort of inquiry that the Speech or Debate Clause was designed to prevent.

The holding of the court of appeals apparently is based on the belief that the Speech or Debate Clause should not be read to create immunity in the face of claims of unconstitutional action, else Members of Congress and their aides could violate the Constitution with impunity. In other words, the court made "the familiar argument that the broad protection granted by the Clause creates a potential for abuse. That is correct, and * * * we [have] noted that the risk of such abuse was 'the conscious choice of the Framers' buttressed and justified by history. * * * Our consistently broad construction of the Speech or Debate Clause rests on the belief that it must be so construed to provide the independence which is its central purpose." *Servicemen's Fund, supra,* 421 U.S. at 510–511. The Framers understood that it was necessary to choose between the potential evils of mistake and abuse of power, on the one hand, and the evils of executive and judicial interference with the conduct of legislative activities, on the other. Cognizant that the electorate's periodic review of legislators' actions would constitute an independent check on legislative incompetence or malfeasance, the Framers chose to tolerate congressional mistakes and abuses as the lesser evil. See *United States* v. *Brewster, supra,* 408 U.S. at 516.

be a violation of the Fourth Amendment. *United States* v. *Janis*, 428 U.S. 433, and *Burdeau* v. *McDowell*, 256 U.S. 465, establish that receipt by federal officials of documents unconstitutionally or improperly seized by state officials or private persons is not a separate constitutional wrong. The situation is the same, so far as the Fourth Amendment is concerned, whether or not the documents "taken over" are relevant to some further inquiry. The relevance of the documents might be important in a case based on a common law invasion of privacy theory, but it would not control any constitutional question.

C. ANY ERRORS IN THE PROCESS OF GATHERING INFORMATION FOR A CONGRESSIONAL COMMITTEE ARE AN INSUFFICIENT BASIS FOR THE IMPOSITION OF LIABILITY

If the Court agrees with the arguments we have made above, it should reverse the court of appeals' judgment without further ado. If the Court should disagree with some of these arguments, however, it could not affirm the court of appeals' judgment without considering the particular types of errors alleged to have occurred here. We submit that, even if some violations of the Fourth Amendment are outside the protection of the Clause, none of respondents' allegations establishes a sufficient basis for the imposition of liability.

1. Senator McClellan is immune for his role in authorizing the investigation

Senator McClellan has filed an affidavit (A. 47–50) stating that he participated in the events described by the complaint only as Chairman of the Subcommittee, authorizing the Subcommittee's investigation. Senator McClellan denied participating in any way in the planning or execution of the state raids (A. 49). Although respondents filed an answering affidavit (A. 55–56) stating "on information and belief" that Senator McClellan "joined in the conspiracy of the defendant Ratliff to force us out of Pikesville," respondents never stated what information to this effect they had in their possession.

The record therefore shows no more than that Senator McClellan authorized in general terms Brick's investigatory activity. That is not enough to overcome Senator McClellan's Speech or Debate Clause immunity. Even if Senator McClellan had explicitly instructed Brick to act as he did, he still would be protected by legislative immunity. See *Kilbourn* v. *Thompson,* 103 U.S. 168, which held that Members of Congress were immune for instructing the Sergeant-at-Arms of the House to make an arrest that this Court held was improper. See also *Doe* v. *McMillan, supra* (Members are immune for instructing the Public Printer to disseminate copies of a report, although the Printer might be liable for the actual distribution); *Powell* v. *McCormack,* 395 U.S. 486, 501–506 (Members are immune for excluding another

Member unconstitutionally, but employees of Congress who act in reliance on the resolution of exclusion may be liable).

Senator McClellan's role in authorizing Brick's investigation therefore cannot be the basis of liability. If, as *Kilbourn* and *Powell* establish, Members of Congress are not liable even for issuing explicit directions that other persons act in a way that violates the Constitution, surely they are not liable for simply not supervising congressional employees sufficiently to prevent misconduct.

2. Senator McClellan, Adlerman, and O'Donnell cannot be held vicariously responsible for Brick's acts

Kilbourn, Doe, and *Powell,* which we have discussed immediately above, necessarily establish that Members of Congress are not vicariously liable for illegal or unconstitutional acts committed by congressional employees. That principle should apply equally to the question whether one legislative employee may be vicariously liable for the acts of another.

Judge Leventhal acknowledged that "the record at present is silent on the involvement of defendants McClellan, Adlerman and O'Donnell" (Pet. App. 45a; see also *id.* at 22a n. 43). That should have led the court of appeals to direct the entry of judgment in favor of these three petitioners. The Speech or Debate Clause does not permit Members of Congress and their aides to be subjected to extensive discovery by

persons who seek to explore their case in search of its existence. Because the Clause protects Members and their aides against even the process of discovery,[23] plaintiffs must make out a sufficient case to survive a motion to dismiss on Speech or Debate Clause grounds; unsupported hope that something might turn up is not enough.

The court of appeals acknowledged that respondents have not shown how anyone other than Brick was involved in improper activities. This case therefore is controlled by *Dombrowski* v. *Eastland, supra.* This Court concluded that that case could not continue against Senator Eastland (although it could continue against Counsel Sourwine) because "[t]he record [did] not contain evidence of [the Senator's] involvement in any activity that could result in liability" (387 U.S. at 84). That is true here as well. A decade after the state raids took place, the record still does not contain any evidence that Senator McClellan, Adlerman, or O'Donnell participated in any way in the actions of Brick that have become the focus of this case (Pet. App. 101a). They are entitled to dismissal of the suit.

Judge Leventhal suggested (Pet. App. 45a) that petitioners could make "a renewed motion for summary judgment" on the ground that respondents have not adduced facts demonstrating the involvement of persons other than Brick in any improprieties. But

[23] See, *e.g.*, *Dombrowski* v. *Eastland*, *supra*, 387 U.S. at 85; *Powell* v. *McCormack*, *supra*, 395 U.S. at 503; *Servicemen's Fund*, *supra*, 421 U.S. at 503.

petitioners already have made one motion for summary judgment on Speech or Debate Clause grounds, and under *Dombrowski* that motion put in issue any question of involvement. Respondents were required to show, if they could, that they would be able to prove involvement. Respondents' affidavit contained only very general allegations, unsupported by specifics (A. 54–56), and it did not create any disputed issue of material fact on this question. Petitioners therefore were entitled to judgment in their favor without the necessity of further proceedings.[24]

[24] Respondents argue (Br. in Opp. 8–9) that this contention was not "pleaded" in the district court and is not subsumed in the questions presented. Respondents are incorrect on both counts.

Petitioners' motion to dismiss raised the argument that the Speech or Debate Clause afforded absolute immunity (A. 45–46); if respondents desired to controvert the allegations of Senator McClellan's affidavit (A. 47–50), they were required to do so then. The motion to dismiss, which was stated in general terms, was sufficient to raise the arguments we now present. Moreover, the court of appeals explicitly considered the consequences of respondents' failure to connect Senator McClellan, Adlerman, and O'Donnell to Brick's improprieties; if the court of appeals had agreed with the arguments we made, it would have ordered the suit to be dismissed at least with respect to these three petitioners.

We also believe that this argument is fairly comprised within the first question presented (page 2, *supra*). That question is whether the Speech or Debate Clause precludes liability for the investigative activities that took place here, and although the argument made in this portion of the brief pertains to only three of the four petitioners, it is squarely based upon the Speech or Debate Clause. We so interpreted the question at the time we wrote the petition, and the petition made this argument (Pet. 16–17), thereby alerting the Court that we believed that this issue was presented not only by the case but also by the questions we phrased.

3. Brick is not responsible for any violations of the three-judge court's "safekeeping" order or liable for the transportation of documents not relevant to the Subcommittee's investigation

Judge Leventhal offered two central arguments in support of his conclusion that respondents had made a "colorable" showing that Brick violated respondents' rights: (1) that Brick's inspection and receipt of copies of the documents seized by the State violated the three-judge court's order appointing Ratliff as custodian for the documents, and (2) that Brick transported to Washington copies of documents that proved to be immaterial to the legislative inquiry.[25] We discuss these arguments in order. In our view, neither would justify an award of damages even against Brick.[26]

[25] Judge Leventhal also relied on the fact that the documents had been seized illegally by the state officials (see Pet. App. 28a and note 14, *supra*), although it is difficult to discern whether this feature of the case contributed to Judge Leventhal's conclusion that respondents had made out a colorable showing of wrongdoing by Brick. There was no impropriety in the mere receipt of documents illegally seized by third parties. *United States* v. *Janis*, 428 U.S. 433. See also *Burdeau* v. *McDowell*, 256 U.S. 465 (receipt and use by public officials of documents wrongfully seized by private persons does not amount to a separate Fourth Amendment "seizure"). The fact that illegally-seized documents were "taken over" by Brick for use by Congress would not violate any rights of respondents, and even if it did violate their rights the Speech or Debate Clause would provide absolute immunity. See *Dombrowski* v. *Eastland*, *supra* (Member of Congress and his aide are absolutely immune for their roles in "takeover" of illegally-seized documents).

[26] Our discussion assumes that the claim for relief against Brick survives his death and has not abated. But see note 10, *supra*.

a. Requiring Brick to answer for any violations of the "safekeeping" order would be yet another form of vicarious liability, inconsistent with the purposes of the Speech or Debate Clause. The "safekeeping" order names Ratliff as the custodian of the documents (A. 78). It imposes no duties on Brick.[27] Respondents have not alleged or offered to introduce evidence to show that Brick was aware that the actions of Ratliff violated the order. Indeed, it is undisputed that Ratliff himself believed that he had authority to act as he did (Pet. App. 63a), and it was stipulated that Ratliff voluntarily furnished the copies to Brick (A. 20; see also A. 97, 100–101, 102).

[27] Under Fed. R. Civ. P. 65(d), Brick would be "bound" by the order if he were acting "in active concert or participation with [Ratliff after] receiv[ing] actual notice of the order by personal service or otherwise." Brick was not served with the order, and he did not receive actual notice of it until after he had received the copies of the documents (see A. 20, 103). The provisions of Rule 65(d) are "derived from the common-law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control. In essence it is that defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding." *Regal Knitwear Co.* v. *National Labor Relations Board*, 324 U.S. 9, 14. But Brick was not Ratliff's agent or cat's paw. The question, rather—one on which ten judges were evenly divided—was whether Ratliff should have formally sought the permission of the three-judge court before showing the copies to Brick. The duty to seek permission, if there was one, was placed only on Ratliff, and the fact that Brick had actual notice of the order would not affect the fact that the onus to seek permission was on the custodian.

The copies were provided to Brick in his motel room by Thadeus Scott, a state detective, and the documents to be copied were selected by Ratliff and Scott (A. 20, 97). Brick played no role in the selection of these copies (A. 97, 100–101; Pet. App. 26a n. 49, 106a), nor did he take any original document. Brick did not learn of the "safekeeping" order until after he had received the copies furnished by Ratliff and Scott (A. 20, 103). Although Brick later examined some original documents in Ratliff's custody, he did not take any of these originals or copy them (A. 20, 98, 104). Under these circumstances Brick cannot be held responsible, consistent with the Speech or Debate Clause, for the fact that Ratliff did not obtain any authorization that may have been required.[28]

b. Judge Leventhal concluded that Brick would be liable for selection and transportation of documents that were not pertinent to the Subcommittee's inquiry (Pet. App. 34a–39a).[29] We submit, to the contrary, that liability on account of the selection and transportation of irrelevant documents is inconsistent with *Doe* and *Servicemen's Fund.*

---

[28] We do not suggest that Ratliff in fact did violate any duties that the three-judge district court imposed on him as custodian. See the opinion of Judge Wilkey at Pet. App. 59a–80a. Our contention is merely that, even if Ratliff erred, his errors cannot be attributed to Brick.

[29] As Judge Wilkey pointed out, a single allegedly irrelevant document has become the focus of this case, and even that document was destroyed by respondents some time ago (Pet. App. 106a n. 108).

Investigation requires the exercise of judgment. An investigator must evaluate the purposes of the congressional inquiry, assess the directions in which the inquiry might develop after Congress acquires additional information, and then apply his best judgment to the material available to him for selection. An investigator must be aware that seemingly irrelevant documents might contain clues to the location or content of other documents that would be more apparently pertinent. Whether he selects or discards a particular document depends on his consideration of these and other factors.

"The very nature of the investigative function—like any research—is that it takes the searchers up some 'blind alleys' and into nonproductive enterprises. To be a valid legislative inquiry there need be no predictable end result." *Servicemen's Fund, supra,* 421 U.S. at 509. It is inevitable that on occasion some investigators will exercise their judgment unwisely. But if every error could lead to liability in damages, the process of investigation would become unacceptably risky. Investigators (and Members of Congress) would be presented with a dilemma: should they acquire a particular document and run the risk of liability if it should turn out to be irrelevant, and, indeed, run the risk of trial if it should be even arguably irrelevant; or should they discard the document and run the risk that valuable information would not come to the attention of Congress?

The Speech or Debate Clause was intended to prevent exposing the legislative process to this dilemma. It is too easy to allege irrelevance; suits and threats of suits could dissuade even the most hardy investigators and Members of Congress from the proper discharge of their duties. Investigators should be able to accept documents tendered to them and to allow Congress to make the decision whether the documents are relevant.[30] They should not be required to make that decision prematurely.

Once it has been determined—as it has been here—that the actions for which a legislator or his aides

[30] Judge Leventhal's opinion emphasized that Brick knew at the time he took the copies that some of the documents were irrelevant to the congressional inquiry (Pet. App. 34a–37a). It is not clear from the portions of the testimony at respondents' trial for contempt of Congress on which Judge Leventhal relies that Brick knew *at the time* that the documents were irrelevant (A. 96–105); Judge Wilkey argued that the documents might well have been relevant to a legitimate inquiry and that Brick was entitled to afford the Subcommittee an opportunity to judge whether they were relevant (*id.* at 105a–114a). But however that may be, reliance on the state of mind of a Member of Congress or one of his aides in carrying out a legislative function is impermissible. This Court has held many times that the courts may not inquire into the motives behind particular acts. See, *e.g.*, *Servicemen's Fund*, *supra*, 421 U.S. at 508–509 ("[i]f the mere allegation that a valid legislative act was undertaken for an unworthy purpose would lift the protection of the Clause, then the Clause simply would not provide the protection historically undergirding it"); *United States* v. *Johnson*, *supra*, 383 U.S. at 180, 183. Cf. *Tenney* v. *Brandhove*, *supra*, 341 U.S. at 377–378. Because inquiry into motive is inconsistent with the protections of the Clause, the acts of Brick—who simply returned to Washington with documents that were selected, copied and offered to him by state officials (A. 20, 97, 100–101, 102; Pet. App. 26a n. 49, 62a, 101a n. 94, 106a)—must be treated as no worse than honest mistakes if indeed they were mistakes at all.

are being questioned were taken during the course of a legitimate investigation with respect to matters on which legislation could be had, it should not matter that hindsight may show that Congress or its agents erred in pursuing its objective. In *Doe*, for example, the Court held that an investigator was immune despite a contention that he obtained private, irrelevant, and defamatory material later published by Congress (412 U.S. at 312). There, as here, the courts were forbidden to inquire into the propriety of that choice, for "[t]he wisdom of congressional approach or methodology is not open to judicial veto." *Servicemen's Fund, supra,* 421 U.S. at 509.

II

THE COURT OF APPEALS SHOULD NOT HAVE REMANDED FOR FURTHER PROCEEDINGS WITH RESPECT TO THE ALLEGATION THAT DOCUMENTS MAY HAVE BEEN SHOWN TO THE INTERNAL REVENUE SERVICE

In 1974—six years after all copies of the documents taken by Brick had been returned to respondents, and five and a half years after they had commenced this suit—respondents filed in the court of appeals two affidavits (A. 57–75) calling attention to the fact that in 1969 the Subcommittee began to make certain information in its files available to agents of the Internal Revenue Service. The court of appeals held that this allegation established a claim of dissemination of information outside the halls of Congress; it also held that the Speech or Debate Clause

does not pertain to such dissemination; and it purported to "affirm" the portion of the district court's order dealing with dissemination (Pet. App. 13a–16a, 44a, 54a, 213a). This decision, which could needlessly prolong this litigation and continue to subject Senator McClellan to the sort of "questioning" the Speech or Debate Clause prohibits, is wrong for several reasons.

A. There was no pertinent order of the district court for the court of appeals to affirm. Respondents' complaint does not allege that private documents were disseminated to the Internal Revenue Service.[31] The injection of the "dissemination" theory into the case in the court of appeals falls short of an amendment of the complaint; that theory has never formally been made a part of respondents' case.

The district court had no occasion to, and therefore did not, pass on the sufficiency of a claim of dissemina-

[31] The amended complaint alleged that Brick exhibited the documents "to persons whose names are unknown to the plaintiffs, to the damage and embarrassment of the plaintiffs" (A. 31–32). This allegation does not appear to encompass dissemination by the Subcommittee within the government. Moreover, Senator McClellan filed an affidavit recalling Brick's uncontroverted testimony in respondents' trial for contempt of Congress that the documents were maintained in a separate file under lock and key, and that they were disseminated to no one (A. 50, 97–98). Respondents' affidavit did not state any fact to the contrary; it merely alleged that the Subcommittee had disseminated information in its files to the Internal Revenue Service. Consequently, even if this allegation of the complaint could be construed as raising the question of dissemination outside of Congress, petitioners would have been entitled to summary judgment because there was no disputed issue of material fact on the question of dissemination.

tion or the extent of legislative immunity with respect to such a claim. Accordingly, the court of appeals lacked authority to proceed as it did. This Court should vacate its judgment to relieve petitioners of any improper consequences of the court of appeals' judgment of "affirmance" and its remand to the district court for further proceedings on the issue of dissemination.[32]

B. None of the allegations in respondents' 1974 affidavits makes out even a colorable claim on which relief may be granted.

1. Respondents' affidavits state that the exchange of documents between the Subcommittee and the Internal Revenue Service commenced in August 1969 (A. 57–58). But it appears to be undisputed that Brick returned all of the copies of respondents' documents in the Subcommittee's possession to state officials on August 14, 1968, more than a year before the exchange of information began (see Pet. App. 8a n. 13, 9a n. 15, 14a n. 25, 31a n. 59; see also A. 98). It is therefore difficult to see what—other than a fishing expedition by respondents—could be the purpose of further proceedings on remand.[33]

[32] If respondents desire to raise a claim of unlawful dissemination, they should start afresh in the district court by filing a new complaint or by amending the present one, provided that the pertinent statute of limitations would permit litigation so long after the events in question.

[33] Respondents speculate (A. 66–67) that documents may have been disseminated prior to the formal program of exchange, but Brick denied under oath that there had been dissemination (A. 97–98), and respondents offer no reason to doubt this testimony.

Nothing in the record tends to show that any of the documents was disclosed outside the halls of Congress, and there is no point in permitting discovery against legislative officials in the absence of such a showing. As Judge Leventhal has explained quite recently, "[w]hen the court is confronted with something as unusual as an attempt to sue Congressmen for participating in a 'public' distribution, the least plaintiffs must supply, before pressing any claim to discovery, is a concrete factual indication that there was indeed a 'public' distribution." *Doe* v. *McMillan,* C.A.D.C., No. 75–2016, decided July 29, 1977, rehearing denied, October 13, 1977, slip op. 3–4 (Leventhal, J., concurring in the denial of rehearing).

2. There has been no contention that the dissemination was "public." The common law tort of invasion of privacy pertains only to "public" dissemination, and the provision of private information to persons in confidence is not tortious.[34] See ALI, *Restatement (Second) of Torts* § 652D and comment *a* (1977). Moreover, under Sections 652F and 652G of the *Restatement,* all of the privileges applicable to defamation cases also apply to invasion-of-privacy cases. Sections 587 and 598 of the *Restatement* summarize the privileges for dissemination of information to law enforcement agencies, such as the Internal Revenue Service.[35] These privileges would bar any action by respondents.

[34] Under *Paul* v. *Davis*, 424 U.S. 693, even the public dissemination of private or defamatory information, without more, would not be a violation of the Constitution. See Pet. App. 102a–104a.

The scope of the common law right of action is consistent with the constitutional principles established by this Court. Under *United States* v. *Janis,* 428 U.S. 433, the Internal Revenue Service would be entitled to make use of any information turned over to it, despite the fact that it had been seized illegally by state officials. Employees of other branches or agencies of the federal government do not commit a tort by transmitting such information to employees of the Internal Revenue Service for official purposes.

C. Finally, even if the provision of information to the Internal Revenue Service would be tortious and unprivileged at common law, the Speech or Debate Clause would bar further inquiry. Provision of information to law enforcement agencies should be encouraged, and it undoubtedly is within the authority of legislative officials, as it is within the authority

[35] See the comments at pages 249 and 283 to these sections. There is a similar privilege for information provided in the course of judicial or legislative proceedings. See *Sachs* v. *Stecker*, 60 F. 2d 73, 75 (C.A. 2); *Brawer* v. *Horowitz*, 535 F. 2d 830, 836–837 (C.A. 3); Harper and James, *The Law of Torts* § 5.22 (1956). The privilege for disclosure to law enforcement agencies is necessary to encourage provision of the information that may be essential to the initiation and successful prosecution of civil and criminal proceedings.

of other officers and employees of the United States.[36]

Dissemination of information to law enforcement agencies is an important and legitimate activity of any public official or employee. As the court of appeals below itself recently noted (*Expeditions Unlimited Aquatic Enterprises, Inc.* v. *Smithsonian Institution, supra,* slip op. 6–7 (opinion of Leventhal, J.)):

> The nation's welfare is dependent upon officials who are willing to speak forthrightly and disclose violations of the law and other activities contrary to the public interest. Their voices will be stilled if they perceive or fear that the

[36] The court of appeals' reliance on *Doe* v. *McMillan*, 412 U.S. 306, for the principle that all dissemination outside the halls of Congress is unprotected by the Clause, is erroneous. That case involved a claim of *public* dissemination; in the present case, by contrast, there is no assertion that the documents were distributed outside the government. In *Doe* the information had been disseminated outside of Congress to the Public Printer, an executive officer, yet the Court did not conclude that this overcame the immunity conferred by the Speech or Debate Clause. The Court held only that public dissemination might be unprivileged, and then only if the public dissemination were unsupported by legitimate legislative needs.

In its decision on remand in *Doe*, the court of appeals held that the distribution of the information in question to numerous federal agencies and private persons with standing orders for legislative materials served a legitimate legislative function and that the distribution therefore was protected by the Speech or Debate Clause. See *Doe* v. *McMillan*, C.A.D.C., No. 75–2016, decided July 29, 1977, slip op. 7 ("the [Supreme] Court determined only that such [public] distribution was not *necessarily privileged*, and not that it was *per se* unprivileged") (footnote omitted, emphasis in original).

> person involved has the resources or disposition to defend with all affirmative tactics.

Those words, written in a case dealing with immunity for executive officials, are no less pertinent here. The Speech or Debate Clause precludes inquiry into respondents' allegation that information pertaining to them was made available to the Internal Revenue Service.[37]

CONCLUSION

The judgment of the court of appeals should be reversed insofar as it subjects petitioners to further proceedings in the district court.

Respectfully submitted.

DANIEL M. FRIEDMAN,
*Acting Solicitor General.**
BARBARA ALLEN BABCOCK,
Assistant Attorney General.
FRANK H. EASTERBROOK,
Assistant to the Solicitor General.

NOVEMBER 1977.

[37] Judge Danaher argued (Pet. App. 117a–130a) that general principles of official immunity shield petitioners from liability for their conduct in this case. Our argument has been based upon the Speech or Debate Clause rather than upon principles of official immunity. We agree with Judge Danaher, however, that principles of official immunity should apply to legislators and their aides, and that these principles prevent the imposition of liability in this case. See our brief in *Butz* v. *Economou*, No. 76–709, argued November 7, 1977. If the Court should disagree with our arguments about the scope of Speech or Debate Clause immunity, it might be appropriate to remand this case to the court of appeals for any further consideration that may be warranted by this Court's decision in *Economou*. (We have furnished a copy of our brief in *Economou* to counsel for respondents.)

* The Solicitor General is disqualified in this case.

U.S. GOVERNMENT PRINTING OFFICE: 1977